

OUR WELFARE:

DOING GOOD AND BEING HAPPY

AVIAM SOIFER*

These three wonderful talks fit together beautifully. They also fit so well with Peter Cicchino as we knew him and as we know him still. My talk centers on the “presence of absence.” Peter urged the need for what he called “a faith story” and for community. I now want to look a little bit at the unusual faith story for which Peter stood and the communities he continues to inspire.¹

Peter’s own faith story is actually a bit tough to tease out. In that wonderful video interview of year ago between Peter and Jamin Raskin, at one point Peter says to Jamin Raskin, “I believe, I hope there is a God.”² But Peter immediately goes on to explain that, like Socrates, he is “firmly convinced that precisely because God is good, God is ethically irrelevant, totally irrelevant.”³ Rather “we do the good because it makes us happy and it makes others happy.”⁴

So of what did Peter’s “faith story” consist? I think it revolved around a contrast. That is, the very contrast that all three talks mentioned: the fundamental disconnect between a world in which sin is terribly important, on the one hand, and the empirical world that compels action that this former Jesuit (Peter) talked about in brilliant speeches and articles, and wonderful meandering conversations, on the other. The world Peter described entailed understanding that public welfare and pursuit of the good are

* Professor of Law, Boston University School of Law. J.D., 1972; M. Urban Studies, 1972; B.A., 1969, *Yale University*.

1. See Peter M. Cicchino, *To Be a Political Lawyer*, 31 HARV. C.R.-C.L. L. REV. 311, 313 (1996) [hereinafter *Political Lawyer*] (stating that a faith story and a sense of community are necessary in order for “political lawyering” to be effective).

2. *An Intimate Portrait of Peter M. Cicchino*, 10 AM. U.J. GENDER, SOC. POL’Y & LAW 7 (2002).

3. *Id.*

4. *Id.*

terribly important.⁵ In that world, the essential issue is not a question of worthiness; rather, it is a question of humanness, and of connecting to other human beings.

I am deeply honored to be here as part of this great gathering to briefly explore Peter's "faith story," briefly. This is and long has been an exceptional law school, as well as a collection of people with an unusually keen sense of humor and of the absurd. Why, even the announcement of this conference appeared over a smiling picture of Kenneth Starr. I thought that was a terrific statement about diversity. But, the old-timers here have been creating a wonderful institution which was, as we all know, so comfortable and so fitting for Peter. Therefore, my remarks are intended not merely as a tribute to Peter, but to this unique law school community.

It is also particularly fitting to be here because I have recently been doing some reading about John F. Kennedy. Arguably the most important speech of President Kennedy's life, and arguably his best speech as well, was the speech he gave at American University on June 10, 1963.⁶

President Kennedy had just returned from Honolulu that morning. He changed his shirt at the White House, came over to American University, and in that speech began the process that led to the comprehensive test ban treaty.⁷ Kennedy quoted the English poet laureate John Masefield, who proclaimed that, "There are few earthly things more beautiful than a University [because a university] is a place where those who hate ignorance may strive to know, where those who perceive truth may strive to make others see."⁸ In precisely this sense, what a great home American University was for Peter Cicchino! Kennedy's commencement address continued with his recognition that, "[i]n the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children's future. We are all mortal."⁹ Peter's keen sense of essential human connection sounds very much like Kennedy. Peter sounded like Kennedy in another way, too. John F. Kennedy liked to quote Aristotle, and so did Peter.

5. See *Political Lawyer*, *supra* note 1, at 314 (describing his experience as a Jesuit working in a soup kitchen in Philadelphia).

6. Pres. John F. Kennedy, Commencement Address at American University (June 10, 1963) (transcript available in the John Fitzgerald Kennedy Library).

7. See U.S. State Department, *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water* (Jan. 20, 2001), available at <http://www.state.gov/www/global/arms/treaties/ltbt.html>.

8. Pres. John F. Kennedy, Commencement Address, *supra* note 6.

9. *Id.*

What Kennedy quoted was Aristotle's definition of happiness. Happiness is what Peter wrote about over and over again in different ways. Aristotle once said that "[t]he good of man is an active exercise of his soul's faculties in conformity with the excellence or virtue, or, if there be several human excellence or virtues, in conformity with the best and most perfect of them."¹⁰

With characteristic enthusiasm, deep learning, analytic power, and upbeat aplomb, Peter indeed repeatedly examined and extolled a good and happy life. Peter was absolutely clear about this. As Peter succinctly put the point in his keynote address at the Robert Cover Conference for Public Interest Law in the New Hampshire woods in 1998, "[I]n our work to protect the human rights of our clients, we are making a good and happy life for ourselves."¹¹ As Peter approached his fortieth birthday, he said that in essence there is only one important question from which all others flow: "[I]n what does a good life consist and how do we go about living such a life?"¹² The answer, following Peter's lead, can be summed up simply. We should be welfare workers!

Sadly, most law schools have a different view. In most law schools a famous quotation from the flinty New Hampshire constitutional scholar Thomas Reed Powell is more apt. Powell said, "If you can think about something which is attached to something else, without thinking about what it is attached to, then you have what is called a legal mind."¹³ What I have to say is indeed a *ferverino*, "a deliberate preaching to the choir."¹⁴ I do not know if my friend Leti Volpp disagreed with Peter about such an approach, and whether I disagree with her or not. I am looking to preach to the converted, with all deliberate speed, and to try to coax out of what has been said by the other panelists and out of Peter's writings, what we mean by public welfare.

So, first of all, what do we mean by welfare, which Peter inspired us to worry about deeply and to pursue vigorously? To begin, even if it smacks slightly of the benighted textualism of the United States

10. ARISTOTLE, NICHOMACHEAN ETHICS BK. I (H. Rackham trans., Harv. U. Press, 1947).

11. Peter M. Cicchino, *Defending Humanity*, 9 AM. U. J. GENDER SOC. POL'Y & L. 1, 6 (2001) [hereinafter *Defending Humanity*]. Publication of speech Cicchino gave at the 1998 Robert Cover Conference for Public Interest Law.

12. *Id.*

13. Thurman W. Arnold, *Criminal Attempts – The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 38 (quoting Powell).

14. See *Defending Humanity*, *supra* note 11, at 3 (noting that those already converted to a cause must be inspired to continue supporting that cause).

Supreme Court, I looked "welfare" up in the Oxford English Dictionary. It turns out that what welfare means is, actually, Peter. I found welfare defined precisely as one might define Peter's presence in our lives, and vice versa. The Oxford English Dictionary's very first definition of welfare is "The state or condition of doing or being well; good fortune, happiness, or well-being (of a person, community, or thing); thriving or successful progress in life, prosperity."¹⁵ That was and remains Peter. It also entails what Peter was talking about when he emphasized happiness. Over and over again, we find him urging that we look for flourishing of our fellow human beings and thus flourish ourselves.¹⁶ Peter underscored the obligation we have to make sure that others get "what it is they need for flourishing—food, shelter, work, education, liberty, dignity."¹⁷

Peter's great article, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*¹⁸, can hardly be read with any care without coming away entirely convinced by Peter's careful, astute empirical arguments. The article also contains the similarly astute and effective advocacy about which the other panelists talked. Peter earned the highest belt with his mastery of a form of "judo": let's take the underlying values that are agreed upon, and then let's force society to look at them in the context of the real world, of numbers and of cause and effect, and of children who lack the basic means to flourish. Peter's expertise at this "judo" could simply floor someone, such as the listener who had sufficient *chutzpah* - or enough appalling indifference—to ask, after Peter presented this paper at another academic institution, how Peter knew that human starvation was bad. Writ larger, Peter's response became the article's compelling conclusion. Peter emphatically lived the belief in a preferential option for the poor that he continued to share with the Jesuits. And Peter ended his article forcefully with "a simple empirical fact: like the gods of old, the cult of the market demands the sacrifice of children."¹⁹

In the process of demolishing "the fundamental intellectual dishonesty of the conservative position on child poverty and poor

15. OXFORD ENGLISH DICTIONARY 108 (2d ed. 1989).

16. See *Defending Humanity*, *supra* note 11, at 6 (noting that when political lawyers help their clients they only make their own lives better).

17. *Id.* at 4.

18. Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. POL'Y 5, 7 (1996) [hereinafter *Problem Child*].

19. *Id.* at 105.

relief,”²⁰ Peter enacted an Aristotelian insight he liked to quote: “[f]or it is not enough to have a supply of things to say, but it is also necessary to say it in the right way.”²¹ Peter repeatedly provided those who knew him—or who listened to, or read, his words—with an incomparable sense of framing. Within Peter’s frame, we find great seriousness about the pursuit of happiness and a nuanced sense of the obligation to protect, all marvelously tied together by Peter’s inimitable style. Peter had a wonderful and abiding sense of the need to pursue seriously the core question of what it means to be a happy human being. This involves, Peter said, striving to overcome the fear that prevents us from doing what our ideals tell us.

Somewhat surprisingly, Aristotle also played a key supporting role within Peter’s keen theatrical sensibility. This was because Aristotle was good at rhetoric, and because he emphasized attention to the facts, to the style, and to the delivery. It seems to be generally very different today. Clifford Geertz, for example, recently wrote in *Life Among the Anthros*, an article about bitter battles among anthropologists, that all that matters in our discourse today is “velocity and volume.”²²

Peter, like Geertz, said that merely skimming the surface is a significant measure of what’s wrong now.²³ For example, in Peter’s article about the public morality defense of inequitable laws, he condemned the notion that any reason will suffice as a matter of equal protection doctrine.²⁴ But he also stressed a sense of obligation, both to examine and to act, as a matter of living a happy life.²⁵ In place of reasons—and the tragedy indeed may be that everyone does have his reasons—Peter suggested the need for a particularized grand narrative.²⁶ Such a narrative carefully examines,

20. *Id.* at 104.

21. *Id.* at 85 (quoting ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* 1404a (George A. Kennedy trans., Oxford University Press, 1991)).

22. Clifford Geertz, *Life Among the Anthros*, 48 N.Y. REV. 20 (Feb. 9, 2001) (reviewing Patrick Tierney, *Darkness in El Dorado: How Scientists and Journalists Devastated the Amazon* (2000) and commenting on the effects of cyberspace on our society).

23. See Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, (1998) [hereinafter *Reason and the Rule of Law*] (arguing that alone, a mere assertion of public morality is not enough to satisfy a legitimate interest in equal protection review, unless one also considers the “empirical effect on public welfare”).

24. *Id.* at 178 (noting that “public morality” reasons should not be used in equal protection analysis because they are unrelated to proven human experience).

25. See *Defending Humanity* *supra* note 11, at 8 (stating that the “Golden Rule” should govern our actions when we recognize another as a human being).

weighs, and chooses reasons.²⁷ Hard empirical thinking about the world thus is compelled, and so is pondering “the constitutive elements of a good human life.”²⁸ In the end, there is no clear end beyond human flourishing.²⁹

And such recognition mandates use of human experience “as source and guide, and return to human experience in a never ending process of refinement and revision.”³⁰

It was by happenstance that I first met Peter when we were on the same panel at the Political Lawyering Conference at Harvard Law School in 1995. The talk Peter gave, *To Be a Political Lawyer*, which was later printed in the Harvard Civil Rights-Civil Liberties Law Review, simply blew people away.³¹ It was an extraordinary moment. The conference was full of all sorts of committed people with fancy credentials and experience. What Peter said was different from the others. It was deep and based in a profound faith story noticeably different from the usual faith story.³²

Again and again, Peter went back to the classics. Aristotle and Socrates played major roles in his writing. Yet Peter conceded that Socrates, and people who follow Socrates, run the grave danger of being arrogant.³³ Nevertheless, Peter used Socrates and Socrates’s response to people who say you cannot talk about politics, to demonstrate that we have to talk about politics and about the obligations the concept of politics entails.³⁴ We have to talk about flourishing, Peter argued.³⁵ We have to talk about happiness.³⁶ We have to talk about what’s needful, and what’s needed.³⁷ Peter said, finally, that exposing the ways in which so many of the orthodoxies of our age are evil and conflict with our culture’s deepest and best

26. See *Reason and the Rule of Law*, *supra* note 23, at 178 (noting that the way in which to insure a grand narrative is to require that all reasons are related to public welfare).

27. See *id.* at 178 (explaining that reasons related to the public welfare must be arrived at through reason and not subjective morality).

28. *Id.* at 173.

29. *Id.* at 193.

30. *Id.*

31. See *Political Lawyer*, *supra* note 1.

32. *Id.* at 314 (sharing his faith story of “becoming and being a political lawyer”).

33. *Id.* at 311.

34. *Id.* at 312.

35. *Id.*

36. See *Political Lawyer*, *supra* note 1, at 311 (stating that a political lawyer should recognize that he knows how to be a happy human being and should share).

37. See *id.* at 312 (noting that human connections are essential for people to understand each other and to provide aid to those who are different).

values is what we ought to be about.³⁸

It used to be said by some of our best judges—by J. Skelly Wright, for example, in *Hobson v. Hansen*,³⁹ which involved equality in the District of Columbia public schools—that statistics say much, and that courts ought to listen.⁴⁰ Courts do not listen any more. Now it is supposed to be exclusively a story of individual bad motive, of sin. That is the dominant motif in our contemporary law. It is also the locus of what is wrong.

What we ought to be talking about, it seems to me, is protection of the obligation to protect. It is hardly an accident that Peter talked and wrote about children, because children obviously need protection. Yet so do all the rest of us, at least some of the time. In the federal constitution, we can find a reference to protection—indeed, to equal protection—within the Fourteenth Amendment.⁴¹ We tend to worry only about the “equal” part. We hardly ever seem even to talk about the “protection” part.

It strikes me that the pursuit of welfare on the ground, where people actually live, directly implicates the protection part of equal protection. It also involves communities and not merely individual rights.

Hannah Arendt said that judging, unlike thinking, requires the presence of others whose perspectives must be taken into consideration.⁴² Judging requires enough imagination to put ourselves in the place of another human being.⁴³ This helps to describe Peter, and to explain how Peter managed to be such a keen judge without becoming judgmental or self-righteous.

Unforgettably, however, we also have considerable written evidence, keen recollections, and a deep living sense of Peter’s style. Despite his incisive thinking and his impatience with injustice, he never jettisoned his serious sense of humor, nor his amazing personal warmth. That unique style helped Peter give the best keynote we

38. See *Defending Humanity*, *supra* note 11, at 5 (noting that capitalism wrongly teaches us to identify and treat human beings as things rather than individuals); see also *Political Lawyer*, *supra* note 1, at 313 (explaining that an emphasis on difference hinders the growth of our understanding of and compassion for those who are different from us).

39. 320 F. Supp. 409 (D.C. 1970).

40. See *id.* at 416 (noting that evidence of inequalities among school was eradicated statistical evidence).

41. See U.S. CONST. amend. XIV § 1 (stating, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws”).

42. See HANNAH ARENDT, *THE LIFE OF THE MIND* 257 (1978).

43. *Id.* (noting that although we may not know what is going on in the minds of others, perspective is a required element in judging).